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Court : Allahabad

Decided On : Jul-20-1915

Reported in : 30Ind.Cas.2

Judge : Henry Richards, C.J. and; P.C. Banerji, J.

Appellant : Puran Mal

Respondent : Tarif and ors.

Judgement :

1. This appeal arises out of a suit brought by an alleged reversioner against the transferors of a deceased Hindu widow. The Court of first instance dismissed the plaintiffs' suit. The lower Appellate Court reversed the decree and decreed the plaintiffs' claim.

2. The widow was one Musammat Hukmo, She made an alienation of the whole property as far back as the year 1888 in favour of one Shibba. Shibba on the 16th of May 1896 transferred part of the property so alienated to him to the defendant Puran Mal. The Court of first instance found that Musammat Hukmo had died some 18 years before the institution of the suit, giving some what cogent reasons for its finding. the lower Appellate Court found the utmost difficulty in believing the plaintiffs' story as to the date of the death of Musammat Hukmo. It appears, however, that when the present suit was first instituted, in addition to Puran Mal the two daughters-in-law of Shibba were made parties. The plaintiffs in their plant

had alleged that Musammat Hukmo had died a year before the institution of the suit. The two lady defendants in their written statement had said that Musammat Hukmo died 41/4 years before the institution of the suit. The ladies do not appear to have taken any further step of any kind in defending the suit, and in the first instance it was decreed ex parte. Purnan Mal subsequently applied to have the ex parte decree set aside and was successful. The learned District Judge, after stating that he does not believe the plaintiffs' evidence as to the date of the death of Musammat Hukmo, proceeds as follows: The fact that Musammat Misri and Musammat Manno said originally that Hukmo died four years ago is to my mind the one piece of untainted evidence in the whole case and I would be prepared to accept it. By their admissions Musammat Misri and Musammat Manno stood to lose that portion of the property of Har Narain held by Musammat Hukmo which she had passed to Shibba.'

3. It is certainly somewhat suspicious that the Musammats who never fought out the case should have been so particular to allege the date of the death of Musammat Hukmo. It is also somewhat remarkable that the plaintiffs at once accepted the date and had their plaint amended. The two Musammats had absolutely nothing to gain by putting in their written statement that Musammat Hukmo died 41/2 years before the suit. It could not have helped them in any way in making a defence to the suit. Their motive for making the statement is very obscure, unless they intended to help the plaintiff. Why the plaintiffs should have amended their plaint when they were getting an ex parte decree is also not very clear. However, in our opinion, the statement made by these ladies in their written statement was not evidence against Purnan Mal. The ladies were not called as witnesses. It is clear, therefore, that if the statement of the ladies be excluded, in the opinion of both the Courts below the plaintiffs failed to prove the death of Musammat Hukmo within 12 years of the institution of the suit. The onus undoubtedly lay upon the plaintiffs of proving the death of Hukmo within 12 years, so as to show that they had a subsisting title at the date of the institution of the suit. The learned District Judge has, however, decreed the plaintiffs' claim on the ground that the trial Court ought never to have set aside the ex parte decree. In our opinion the question of the propriety of setting aside the ex parte decree was a matter which could not be considered by the learned District Judge in appeal. No

appeal is given by the 'Code from an order setting aside an ex parte decree. It cannot be taken exception to later on in a regular appeal, because it did not affect the merits of the case. This has been repeatedly held by this Court. In our opinion the decree of the Court of first instance was correct and ought to be restored. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

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